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Turning Plowshares Into Swords and Bananas Into Barrettas: A Call for a Revision to the UCMJ To Include Unloaded Firearms as Dangerous Weapons

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TURNING PLOWSHARES INTO SWORDS AND BANANAS INTO BARRETTAS: A CALL FOR A REVISION TO THE UCMJ TO INCLUDE UNLOADED FIREARMS AS DANGEROUS WEAPONS

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INTRODUCTION

The United States Court of Appeals for the Armed Forces ("CAAF") recently decided the issue of whether unloaded firearms are to be considered "dangerous weapons" for purposes of a conviction for assault with a dangerous weapon. The CAAF's decision ended a dispute among various military justice decisions. The CAAF concluded that under Article 128 of the Uniform Code of Military Justice ("UCMJ") an unloaded firearm was not a dangerous weapon. However, a dissenting opinion disagreed and went so far as to say that denying that an unloaded firearm is a dangerous weapon is tantamount to turning swords into plowshares and Barrettas into bananas.[1] This Article will examine the lower military courts' disagreement as to whether or not an unloaded firearm is a dangerous weapon for purposes of Article 128, and the CAAF's decision on the issue. It will then suggest that, in the wake of the CAAF's decision, either the *Manual for Courts-Martial* or Article 128 of the UCMJ should be revised to include an unloaded

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[1] United States v. Davis, 47 M.J. 484, 488 (C.A.A.F. 1998) (Sullivan, J., dissenting).

firearm as a dangerous weapon. The Article will then examine why such a revision is desirable and why such a revision meets the theories of punishment generally accepted in American jurisprudence.

I. LOWER MILITARY APPELLATE COURTS' INTERPRETATION OF "DANGEROUS WEAPON"

Article 128 of the UCMJ provides in part, that "[a]ny person subject to this chapter who . . . commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm . . . is guilty of aggravated assault."[2] Article 128 does not define dangerous weapon.[3] However the *Manual for Courts-Martial* ("*Manual*") states that "an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded."[4] The *Manual* focuses on whether the firearm objectively had the ability to cause grievous harm, not on the victim's subjective state of mind.

This Part analyzes several cases decided at the Court of Military Review level that have interpreted the *Manual*'s definition of dangerous weapon. These cases, including the *United States v. Turner* case examined in Part II, have disagreed about whether an unloaded weapon is a dangerous weapon under the *Manual* provisions. Consequently, these cases formed the basis for the CAAF decision in *United States v. Davis*, examined in Part III of this Article.

A. United States v. Sullivan

In *United States v. Sullivan*, the defendant pointed his loaded pistol at another soldier during a dispute over brewing coffee in the barracks.[5] Although the firearm in *Sullivan* was loaded, the United

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[2] UCMJ art. 128(b), 10 U.S.C.S. § 928(b) (Law. Co-op. 1985).

[3] *Id.* § 928.

[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 54c(4)(ii) (1995 ed.).

[5] 36 M.J. 574 (A.C.M.R. 1992).

States Army Court of Criminal Appeals went out of its way to state that an unloaded firearm brandished in a threatening manner is also a dangerous weapon.[6] In *Sullivan*, the Army Court of Military Review stated that provisions of the *Manual* that excluded unloaded firearms from the definition of "dangerous weapons" were "no longer valid."[7] The *Sullivan* court's decision was based on the Supreme Court's decision in *McLaughlin v. United States*.[8] In *McLaughlin*, the Supreme Court ruled that an unloaded firearm was in fact a dangerous weapon for purposes of the federal bank robbery statute that was at issue.[9] As the Supreme Court stated:

> [A] gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue.[10]

B. United States v. Rivera

In *United States v. Rivera* the defendant pointed an unloaded firearm at two other soldiers, while attempting to escape from custody.[11] The United States Army Court of Criminal Appeals ruled in *Rivera* that an unloaded firearm is not a dangerous weapon under the UCMJ. The *Rivera* court reasoned that both federal and military precedent concerning aggravated assault required that a firearm be loaded or used as a bludgeon to be considered a "dangerous weapon" as a matter of law.[12] The *Rivera* court refused to disregard the federal and military precedent in favor of the Supreme Court's decision in *McLaughlin*, concluding that

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[6] *Id.* at 577.
[7] *Id.* at 577 n.3.
[8] 476 U.S. 16 (1986).
[9] *Id.* at 17.
[10] *Id.* at 17-18.
[11] 40 M.J. 544, 545 (A.C.M.R. 1994).
[12] *Id.* at 546-47.

McLaughlin was addressing a federal penal statute with a substantially different history, purpose, and language than the military aggravated assault statute.[13]

C. United States v. Henry; Booker; and Palmer

Another significant decision similar to *Sullivan*, although it deals with UCMJ Article 122, not Article 128, is *United States v. Henry*.[14] In *Henry*, the defendant appealed his conviction for armed robbery, arguing that the firearm he used during the commission of the crime was inoperable. The Court of Military Appeals rejected the defendant's argument, finding that the *Manual* espouses the same definition of the term "firearm" that is found in the civilian federal criminal code and the federal sentencing guidelines.[15] This definition describes a firearm as any "weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive."[16] The court therefore concluded that the defendant's weapon met the definition of a firearm because the defendant could easily have converted the handgun to operable status. The court further noted that a firearm that is unloaded when a perpetrator uses it to commit a robbery also can justify a charge under the enhanced sentence provision of UCMJ Article 122, because the perpetrator easily could convert the unloaded weapon to an operable firearm.[17]

Another decision of note in this context is the U.S. Navy-Marine Corps Court of Review's decision in *United States v. Booker*.[18] In *Booker*, the defendant's conviction under Article 134 of the UCMJ for assaulting an officer and carrying a concealed

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[13] *Id.* at 548-49. For a more in depth analysis of the decisions in *Sullivan* and *Rivera*, see Major Barto & First Lieutenant Lucarelli, *Dangerous Weapons, Unloaded Firearms, and the Law of Aggravated Assault: The ACMR Hangfires in Two Conflicting Opinions*, 1995-JAN. ARMY LAW. 56 (1995).

[14] 35 M.J. 136 (C.M.A. 1992).

[15] *Id.* at 137. *See also* Major Hunter, *Court of Military Appeals Defines "Firearm" for Purposes of UCMJ Article 122*, 1992-NOV. ARMY LAW. 25, 26 (1992).

[16] Hunter, *supra* note 15, at 26.

[17] *Henry*, 35 M.J. at 137.

[18] 37 M.J. 1114 (1993).

weapon was affirmed. The concealed weapon was an unloaded gun stored in the glove compartment of the defendant's car. Judge Barnes wrote separately from the majority to dissent in part and concur in part. Judge Barnes stated that "[t]he dangerous character of a firearm does not depend on whether it is loaded."[19] In a footnote, Judge Barnes cited *McLaughlin* and noted that the Manual concluded that loaded or unloaded firearms are fairly incorporated in the definition of "dangerous weapon" contained in the UCMJ.[20]

The U.S. Navy-Marine Corps Court of Review again found that an unloaded handgun was a dangerous weapon in *United States v. Palmer*.[21] The *Palmer* court affirmed the conviction of the defendant for wrongfully possessing a dangerous weapon at a naval station in violation of a naval regulation. The court determined that an unloaded gun is a dangerous weapon for purposes of alleged violations of U.S. Navy Regulations charged under Article 92 of the UCMJ.[22] However, the *Palmer* court specifically distinguished its ruling as pertaining to an Article 92 charge and not an Article 128 charge.[23] Furthermore, the court noted that its reasoning followed *Booker*, which addressed an Article 134 charge, not an Article 128 charge. The *Palmer* court felt this was a significant distinction, as the crimes in *Booker* and *Palmer* did not involve "an offense involving the use of an instrument or a weapon, [as Article 128 crimes do] but the gist of the offense, as in the case of carrying a concealed weapon, consists merely in the possession of the weapon."[24]

II. *UNITED STATES V. TURNER*

In *United States v. Turner*, the United States Army Court of Criminal Appeals held that an unloaded pistol was not a "dangerous weapon" that would support conviction under Article 128 for

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[19] *Id.* at 1117.
[20] *Id.* at 1118 n.4.
[21] 41 M.J. 747, 748 (N-M. Ct. Crim. App. 1994).
[22] *Id.* at 749-50.
[23] *Id.* at 749.
[24] *Id.*

aggravated assault.[25] In *Turner*, the defendant pled guilty to aggravated assault after brandishing a pistol during the course of a driving altercation. After his conviction, the defendant tried to recant his plea because it was improvident on the basis of the fact that an unloaded firearm is not a dangerous weapon under Article 128.[26] The *Turner* court, on its own motion, considered the case en banc to resolve the conflict between *Sullivan* and *Rivera*.[27] The *Turner* court ruled that a "dangerous weapon" for purposes of Article 128(b)(1) of the UCMJ, is a weapon that has the "inherent present capability of inflicting death or grievous bodily harm" and "[a]n unloaded pistol, when presented as a firearm," under such definition was not a "dangerous weapon."[28]

While finding that the policy concerns voiced in *Sullivan* were meritorious, the *Turner* court noted that the President, by way of the *Manual*, had "not provided for an enhanced punishment" for assault committed when a weapon that only appears dangerous is used.[29] Since the *Turner* court felt that *Sullivan* was correct from a policy point of view, but an incorrect reading of the controlling authorities, the *Turner* court explicitly called upon the Judge Advocate General of the Army to join with the Judge Advocates General of the other military branches in recommending that the President modify the *Manual* so that assault with a seemingly dangerous weapon would result in the maximum sentence available for simple assaults.[30]

Judge Johnston wrote the first dissent to the majority opinion in *Turner*. He began by noting the "bizarre" dichotomy that results from the fact that someone who carries a firearm that is unloaded in a concealed manner is subject to a more grievous maximum punishment than someone who threatens and openly points an unloaded firearm at another.[31] Judge Johnston noted that, "[i]f the

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[25] 42 M.J. 689, 691 (A. Crim. App. 1995).

[26] *Id.* at 690.

[27] *Id.*

[28] *Id.* at 691.

[29] *Id.*

[30] *Id.* at 692.

[31] *Id.* (Johnston, J., concurring in part and dissenting in part). This is because the *Manual*, for purposes of defining a dangerous weapon for the offense of

majority view is correct . . . an unloaded rifle or pistol is 'dangerous' for virtually all purposes in the military except when it is proffered as a firearm during an offer-battery type assault!"[32] Judge Johnston also did not accept the majority's recommendation that the *Manual* be modified so that assault with a seemingly dangerous weapon would result in the maximum sentence available for simple assaults, because he found assault with an unloaded firearm materially different from, and much more egregious and blameworthy than, simple assault.[33] Instead of perpetuating "the flaws of the majority opinion," Judge Johnston called for an interpretation of Article 128 of the UCMJ consistent with *McLaughlin v. United States*, which would find that an unloaded firearm is always a "dangerous weapon."[34]

III. *UNITED STATES V. DAVIS*

A. Majority's Decision

In *United States v. Davis*, the United States Court of Appeals for the Armed Forces finally resolved the disagreement as to whether assault with an unloaded firearm is aggravated assault.[35] In *Davis*, the defendant had been convicted of conspiracy to commit assault and battery, violation of a lawful general order, assault with a dangerous weapon, and communication of a threat.[36] The military judge concluded that the weapon the defendant used was not loaded, but convicted the defendant of aggravated assault under Article 128 of the UCMJ, nonetheless.[37] The Court of Criminal Appeals upheld the defendant's conviction

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carrying a concealed weapon states that "[a] weapon is dangerous if it was specifically designed for the purpose of doing grievous bodily harm." MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 112(c)(2) (1995 ed.).

[32] *Turner*, 42 M.J at 692 (Johnston, J., concurring in part and dissenting in part).

[33] *Id.* at 692 n.2.

[34] *Id.* at 694.

[35] 47 M.J. 484 (C.A.A.F. 1998).

[36] *Id.*

[37] *Id.* at 485.

for aggravated assault.[38] Subsequently the Judge Advocate General of the Navy certified to the CAAF the question of whether under Article 128 of the UCMJ an assault with a dangerous weapon can be committed with an unloaded gun, if the victim has a reasonable apprehension of death or grievous bodily harm and the victim is unaware of whether the gun is loaded or operable.[39]

The CAAF, limiting its decision to the circumstances of the case, held that an unloaded weapon is not a dangerous weapon under Article 128.[40] The CAAF first noted that despite the hierarchical military sources of rights, if "'a lower source creates rules that are constitutional and provide greater rights for the individual'" such lower source is controlling.[41] The CAAF found that it was not clear from either the plain meaning of Article 128 or its legislative history that an unloaded weapon qualifies as a dangerous weapon under the statute.[42] Next, the CAAF noted that the President establishes the *Manual for Courts-Martial* by executive order, and that paragraph 54c(4)(a)(ii) of Part IV of the *Manual* states that "an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce bodily harm, whether or not the assailant knew it was unloaded."[43]

The CAAF further noted that it is not bound by the President's interpretation of the elements of substantive offenses.[44] Nonetheless, the CAAF concluded that where the President unambiguously gives an accused greater rights, the CAAF will follow such guidance unless it contradicts the express language of the UCMJ. Because in this context the *Manual* did not expressly contradict the

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Davis*, 47 M.J. at 485-486 (quoting United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992)). The order of the sources of rights is "'the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence, Department of Defense Directives; service directives; and Federal common law.'" *Id.* at 485 (quoting *Lopez*, 35 M.J. at 39).

[42] *Id.* at 486.

[43] *Id.*

[44] *Id.* (citing United States v. Mance, 26 M.J. 244, 252 (C.M.A. 1988)).

UCMJ, and in deference to the President, the CAAF held that pursuant to the *Manual* an unloaded pistol is not a dangerous weapon under Article 128.[45]

In a footnote, the CAAF rejected the contention that the Supreme Court's ruling in *McLaughlin v. United States*[46] was determinative of the definition of a dangerous weapon for purposes of Article 128 of the UCMJ. The CAAF found that the *McLaughlin* decision applied only to the federal bank robbery statute that was before the Supreme Court, and was not intended to be a standard interpretation of the definition of a dangerous weapon for all federal criminal law.[47] However, the CAAF carefully noted that it did not share the President's opinion that the definition of dangerous weapon under Article 128 of the UCMJ did not include an unloaded firearm.[48] The CAAF further stated that "[t]he majority opinion does not constrain the President's authority to change the rule, including a change that would accommodate the policy concerns set forth in the dissenting opinion."[49] Based on its determinations the CAAF reversed the decision of the United States Navy-Marine Corps Court of Criminal Appeals, and returned the matter for disposition consistent with the CAAF's opinion.[50]

B. The Dissent

Judge Sullivan wrote the dissent in *Davis*, arguing that an unloaded firearm should be considered a dangerous weapon under Article 128 of the UCMJ. In Judge Sullivan's opinion the majority's decision that an unloaded firearm was not a dangerous weapon was in clear error:

> The majority reduces this crime to simple assault because it holds that the handgun used in this case was not a dangerous weapon. In my view, prosecutors, law enforcement officials, and perhaps all victims of armed assault

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[45] *Id.*
[46] 476 U.S. 16 (1986).
[47] *Davis*, 47 M.J. at 487 n.*.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 487.

> who have looked into the barrel of a gun or who have had a gun held to their head would not agree with that decision. I certainly do not. I refuse to legally turn a sword into a plowshare or a Barretta into a banana.[51]

Judge Sullivan found that by the language of Article 128, Congress clearly intended to prevent assaults by service members using weapons that are actually dangerous or which are reasonably perceived to be dangerous, including unloaded firearms.[52] Judge Sullivan suggested that Congress' intent in drafting Article 128 was similar to its intent in drafting 18 U.S.C. § 2113(d), which the Supreme Court in *McLaughlin* interpreted as including an unloaded firearm within its definition of a dangerous weapon.[53] Judge Sullivan found the Supreme Court's reasoning for why an unloaded firearm is a dangerous weapon compelling. The Supreme Court reached its conclusion in *McLaughlin* after noting that an unloaded firearm is inherently a dangerous weapon by its very nature; the presence of a firearm "instills fear . . . [thereby] creat[ing] an immediate danger that a violent response will ensue;" and a gun can harm as a bludgeon.[54]

IV. REVISING THE *MANUAL* OR UCMJ ARTICLE 128

The footnote comments of the *Davis* majority make clear that absent the definition of dangerous weapon supplied by the *Manual*, the majority might not have concluded that an unloaded firearm is not a dangerous weapon. Judge Sullivan's dissent further indicates that the CAAF might consider an unloaded firearm a dangerous weapon absent the *Manual*, or if the UCMJ itself gave an indication in that direction. There are convincing reasons why an unloaded firearm should be considered a dangerous weapon. Furthermore, punishing a service member for using a firearm in the commission of a crime, even when such firearm is not loaded, meets the policy concerns of punishment under American

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[51] *Id.* at 488.

[52] *Id.*

[53] *Id.* at 488 n.2 (citing McLaughlin v. United States, 476 U.S. 16, 18 n.3 (1986)).

[54] *McLaughlin*, 476 U.S. at 17-18 (footnote omitted).

jurisprudence. Therefore, Congress and the President, and their designated drafters of the UCMJ and the *Manual*, should consider making revisions such that an unloaded firearm would be considered a dangerous weapon for purposes of Article 128.

A. Why an Unloaded Firearm Should be Considered a Dangerous Weapon

The *Manual* or Article 128 of the UCMJ should be revised to include an unloaded firearm as a dangerous weapon because the use of an unloaded firearm in the commission of a crime potentially makes the offender's action substantially more harmful. The use of an unloaded firearm increases the chances that the victim or a bystander will be shot; that psychological and physiological harm will be done to the victim or a bystander; and that the offender himself will be shot.

The use of an unloaded weapon increases the chances that the victim or a bystander will be shot because, while the offender might think his firearm is not loaded, it may in fact cause an unintended discharge. Military thinking supports this concern, because in the military all weapons are to be treated as loaded.[55] While trained service members might be less likely than untrained civilians to accidentally discharge their firearm, a survey of recent news accounts reveals an unfortunate number of accidental shootings in the military.[56] Therefore, by bringing a weapon into

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[55] *See generally, e.g.*, GUIDEBOOK FOR MARINES (17th rev. ed. 1997) (discussing safety precautions for United States Marine Corps personnel).

[56] *See, e.g.*, *Army Investigating Accidental Shooting of Reserve Sergeant*, SEATTLE POST-INTELLIGENCER, Mar. 27, 1996, at B2; *Army Rules Shooting of Officer an Accident*, COURIER-JOURNAL (Louisville, Ky.), Aug. 25, 1995, at 4B; Steve Farr, *Air Force Rules Jet Shooting an Accident*, ASSOC. PRESS, July 3, 1996, *available in* 1996 WL 4430155; Christopher Rickett, *'Unloaded' VMI Gun Kills Boy, 10*, ROANOKE TIMES & WORLD NEWS, Apr. 28, 1996, at B4; *Shooting Death of Marine an Accident, Military Says*, GREENSBORO NEWS & RECORD, Apr. 14, 1997, at B3. A survey of recent news reports also reveals a substantial number of unfortunate accidental shootings by civilians. *See, e.g.*, Andy Gotlieb, *Police Told "Unloaded" Gun Killed Woman*, TAMPA TRIBUNE, June 4, 1997, at 1; *Shooting Suspect Claims He Thought Gun Was Unloaded*, TIMES UNION, Aug. 9, 1998, at D2; *'Unloaded' Weapon Fatal to Motorist*, TULSA WORLD, Sept. 23,

the often chaotic situation created by the offender's action, the offender increases the probability that a weapon he believes is not loaded will in fact discharge, perhaps harming or even killing the offender's victim or a bystander. In addition, the offender's use of even an unloaded weapon in a crime increases the probability that the victim or a bystander will be shot by someone trying to prevent the crime, or responding to the crime.[57]

A service member who brings an unloaded weapon into a criminal situation also increases the possibility of causing psychological or physiological harm to his victim or a bystander.

> [A] gun is commonly known, regarded, and treated by society as a dangerous device by both the reasonable man and the person at whom it is pointed, without pause to determine whether a round is in the chamber. The primary capacity of a gun to harm . . . plus its apparent capacity to carry out that harm, combined with a highly charged atmosphere and the possibility of action by employees or others to prevent the robbery, is a complex of circumstances in which the person on the scene is in jeopardy of harm which may occur in any one of various ways.[58]

This reasonable and substantial mindset caused by the offender's use of a firearm in a crime, which the victim and bystander do not know is unloaded, may cause serious psychological and

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1997, at A8; *Victim Thought Gun was Unloaded*, PORTLAND OREGONIAN, Mar. 2, 1998, at A1.

[57] United States v. Hamrick, 43 F.3d 877, 883 (4th Cir. 1995) (noting that the danger will arise because "those threatened, their rescuers, or the police, can be expected to respond with force and possibly deadly force, and thereby endanger the safety of victims, bystanders, and even the perpetrator").

[58] Baker v. United States, 412 F.2d 1069, 1071-1072 (5th Cir. 1969) (finding an unloaded gun conclusively dangerous), *cert. denied*, 396 U.S. 1018 (1970). *See also* United States v. Martinez-Jimenez, 864 F.2d 664, 666-67 (9th Cir.) (noting that the robber subjected victim to very real fear of harm even though gun was fake, and holding that a toy gun used in bank robbery constituted a dangerous weapon as defined by 18 U.S.C. § 2113(d), the federal bank robbery statute), *cert. denied*, 489 U.S. 1099 (1989); United States v. Newkirk, 481 F.2d 881, 883 (4th Cir. 1973) (citing United States v. Shelton, 465 F.2d 361 (4th Cir. 1972) (holding that a weapon that appears capable of placing life in danger constitutes a dangerous weapon)), *cert. denied*, 414 U.S. 1145 (1974).

physiological harm to the victim and/or the bystander which endure long after the crime has been committed.[59] In addition, the fear created by the use of a weapon in a crime, whether it is loaded or unloaded, may cause harm from disorganized fleeing and panicked response.[60]

Finally, the service member's use of an unloaded firearm increases the possibility that the service member himself will be harmed or killed. Those responding to the crime and trying to prevent it, fearing the service member is armed, might employ deadly force against the service member.[61] Increasing the punishment for offenders who use an unloaded weapon might in fact be in the best interest of offenders, by discouraging such behavior.

B. Treating an Unloaded Firearm as a Dangerous Weapon Serves Objectives of Punishment

Characterizing an unloaded firearm as a dangerous weapon for purposes of Article 128 of the UCMJ also serves the four traditional objectives of punishment: retribution, rehabilitation, deterrence, and incapacitation.[62] Under a retributive vision of justice, punishment is justified by the need to compensate society for the

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[59] United States v. Medved, 905 F.2d 935, 940 (6th Cir. 1990) (noting that fear from fake weapon can cause heart attacks and other adverse consequences), *cert. denied*, 498 U.S. 1101 (1991).

[60] *Hamrick*, 43 F.3d at 883; *Unloaded Gun Can Support Criminal Recklessness Charge*, NAT'L L. J., Jan. 22, 1996, at B15 (stating that the Supreme Court of Indiana ruled that an unloaded gun created a substantial risk of bodily harm because it can create a variety of bodily risks).

[61] *Martinez-Jimenez*, 864 F.2d at 666; United States v. Beasley, 438 F.2d 1279, 1283 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971). *See also Man Killed by Police Had Unloaded Gun*, SUNDAY PATRIOT-NEWS HARRISBURG, Jan. 15, 1995, at B8; Kieran Nicholson, *12-year-old Suspect's Gun Unloaded, Police Say*, DENVER POST, Feb. 4, 1998, at B3; Kathleen Ostarnder, *Police Provide Details of Standoff, Shooting Man's Gun Was Unloaded, Janesville Officer Was Justified, Chief Says*, MILWAUKEE JOURNAL SENTINEL, Dec. 3, 1996, at 5; *Police Say Man Killed By Officer Had Unloaded Gun*, PORTLAND PRESS HERALD, Sept. 13, 1997, at 5B; Tom Searls, *Man Killed By Belle Officer Had Unloaded Gun, His Brother Says*, CHARLESTON GAZETTE, Feb. 20, 1997, at P3C.

[62] Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1890 (1991).

harm inflicted by the offender.[63] The conceptual underpinnings of this view favor proportionality by striking a moral balance between the punishment inflicted and the gravity of the crime.[64] As noted above, bringing an unloaded firearm into a criminal situation increases the risk of injury to the victim, bystanders, and the offender himself. The offender thereby harms the secure nature of society by introducing chaos and fear of harm, and causes potential harm to the individual members of society. Increasing the punishment to the offender for the increased harm and potential harm is thus a balanced "compensation" to society. In addition, the service member who uses a firearm in a crime betrays the military society which respects the need for firearms in defense of the nation. By using a firearm in a crime the service member uses a tool associated with the military in a manner contrary to the exact principles the military stands to protect. Given the potential grievous consequences introduced by the use of the unloaded firearm, and the damage an offender causes to military society and society at large through his use of the unloaded firearm, an increased punishment is in proportion to the aggravated crime.

Punishment has also been justified on the theory of rehabilitation. Through rehabilitation a criminal is taught attitudes, values, habits and skills by which he can function productively and lawfully.[65] Rehabilitation can take constructive or destructive forms, either helping offenders change their attitude and behavior, or imposing negative stimuli to teach offenders to avoid wrongful behavior.[66] Characterizing an unloaded firearm as a dangerous

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[63] Brian J. Telpner, Note, *Constructing Safe Communities: Megan's Laws and the Purposes of Punishment*, 85 GEO. L.J. 2039, 2055-56 (1997).

[64] Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1164 (1990). Immanuel Kant, the philosophical forefather of retributivism, argued that punishment "can never be used merely as a means to promote some other good for the criminal himself or for civil society, but . . . must in all cases be imposed on him only on the ground that he has committed a crime." David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1627 (1992) (citing IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (John Ladd trans., 1965). Thus, punishment is conceived as an end in itself. Dolinko, *supra*, at 1627.

[65] *See* Massaro, *supra* note 62, at 1893-95.

[66] Telpner, *supra* note 63, at 2058-59.

weapon for purposes of Article 128 helps rehabilitate the service member as a negative stimuli which teaches the offender to avoid wrongful behavior. Furthermore, by increasing the deference with which even an unloaded firearm must be treated, an increased punishment removes stimuli which contributed to the initial offense, such negative stimuli being the casual disrespect for a firearm and its use.

The purpose of punishment under the deterrence model is to prevent future crimes by the same wrongdoer or by others.[67] Deterrence therefore also takes two forms: "specific deterrence" or "general deterrence." Under a specific deterrence model, punishment is justified because a wrongdoer will be deterred from repeating the same acts.[68] Specific deterrence is similar to the rehabilitation rationale; both focus on the future behavior of the individual wrongdoer.[69] Under a general deterrence model, by contrast, punishment is justified as a deterrence to all members of society.[70] Utilitarianism is the philosophical foundation of deterrence-based punishment. Punishment, though arguably imposing some "evil" in its own right, is justified because it maximizes the good for the greatest number by preventing harmful acts from occurring in the future.[71] Defining an unloaded firearm as a dangerous weapon under Article 128 serves the ends of both specific and general deterrence. Increasing the punishment for an offender who uses an unloaded firearm in the commission of a crime deters the offender from callously using an unloaded firearm again in the future because the offender realizes that using an unloaded firearm increases the risk of grievous harm and using an unloaded firearm will engender greater punishment. Furthermore, increasing the punishment for the use of an unloaded firearm under Article 128 will likely deter all service members from using an unloaded firearm in the commission of a crime.

The incapacitation justification for punishment argues that the key to punishment is disabling the offender from committing crime

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[67] Massaro, *supra* note 62, at 1895-96.
[68] Massaro, *supra* note 62, at 1896.
[69] Blecker, *supra* note 64, at 1197.
[70] Telpner, *supra* note 63, at 2061.
[71] Telpner, *supra* note 63, at 2061.

in the future. Punishment should "protect the community from the offender, either by confining her physically, or otherwise disabling her from committing future crimes."[72] Incapacitation justifies imposing external controls on offenders to minimize the future risk to society.[73] Since an offender who uses an unloaded firearm in the commission of a crime increases risk of harm to others and himself, he demonstrates a need for society to put greater controls and better protect itself than if the offender committed the crime without the firearm. Therefore, a greater punishment is necessitated.

C. Means of Change

Because the CAAF in *Davis* found that Congress' will as embodied in the UCMJ trumps the *Manual* and that Article 128 was silent as to an unloaded firearm whereas the *Manual* distinguished it from a dangerous weapon, the CAAF would be free to interpret an unloaded firearm as a dangerous weapon if the President by executive order revised the *Manual* to include such definition or if Congress revised Article 128 to include such definition. While either option is viable, an executive order might be a quicker, more efficient manner of making the change.

Executive orders have become a frequent and powerful tool of presidential policymaking.[74] Since the 1930's executive orders have assumed an ever increasing legislative character, directly affecting the rights and duties of governmental officials.[75] Executive orders do not require congressional approval and thereby

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[72] Massaro, *supra* note 62, at 1899.

[73] Massaro, *supra* note 62, at 1899.

[74] ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY viii (1973); William D. Neighbors, Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 106 (1964); Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44 (1963).

[75] John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839-41 (1981); Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 285-353 (1983); Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U. L. REV. 590, 590-607 (1969); Comment, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688, 688-93 (1972).

enable the President to bypass parliamentary debate and opposition.[76] In contrast, legislative action by Congress entails significant and time consuming debate.[77] The speed and efficiency that executive orders grant the President therefore makes an executive order the appropriate mechanism to amend the *Manual* to define an unloaded firearm as a dangerous weapon for the purposes of aggravated crimes.

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[76] *See* Joel L. Fleishman & Arthur H. Aufses, *Law & Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1, 6, 38-39 (1976); Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659 (1987).

[77] *See, e.g.*, Michael A. Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819 (1991).